NO. 42469-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL DEAN CRAYNE,

Appellant.

BRIEF OF RESPONDENT

MICHELLE L. SHAFFER
W.S.B.A #29869
Chief Criminal Deputy Prosecutor for Respondent

Hall of Justice
312 SW First
Kelso, WA 98626
(360) 577-3080

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1. Factual background

On November 5, 2007, at about 4:30 in the morning, the appellant Michael Dean Crayne rode his bicycle approximately five miles to the RV shared by his estranged wife Cindy[1] and her companion Leo West. Ex. 1. West was awakened by the sound of his dogs barking. *Id.* When West opened the door to the RV, Crayne punched him in the face, and a physical altercation ensued. *Id.* Crayne then tried to shoot West with a homemade firearm that he had brought with him on the bicycle. *Id.* However, it did not fire. *Id.* Crayne then seized control of a handgun that West had on his person and again tried to shoot West. *Id.* After being charged with these crimes, Crayne twice violated the order entered by the court restraining him from having any contact with Cindy. *Id.*

[1] To avoid confusion, Cindy Crayne is referred to as "Cindy". The State means no disrespect.

2. Procedural background

Crayne was originally charged in November 2007 with (1) attempted murder in the first degree with a firearm enhancement, (2) burglary in the first degree with a firearm enhancement, (3) possession of a short-barreled shotgun and (4) assault in the fourth degree (domestic violence). CP 138-40. The State also filed notice of its intent to seek an exceptional sentence, citing five aggravating factors. CP 135-36.

On November 4, 2008, Crayne entered into a plea agreement with the State, pleading guilty to an amended information charging Crayne with assault in the first degree and two counts of gross misdemeanor violation of a no contact order.[2] CP 119-28; RP 13-38. The court sentenced

[2] In his statement on plea of guilty, Crayne said:

> On 11/5/07 in Cowlitz County, State of Washington I went to Leo West's trailer to confront him about sleeping with my wife. I had a firearm with me and intended to scare him with it. Although I maintain that I did not intend to cause him great bodily injury with it, the state has sufficient evidence, if believed by a jury, to prove that I did intend to cause him great bodily injury with the firearm. I am asking the court to find me guilty of the first degree assault charge so I can take advantage of the state's offer to recommend the bottom end of the range and to dismiss the attempted murder charge (with firearm enhancement), the first degree vehicle prowling charge (with firearm enhancement), the possession of an unlawful firearm charge, and the third degree assault charge (with firearm enhancement). I don't want to take the chance of being convicted of the attempted murder charge because it carries a potential sentence of over 20 years.

Crayne to 93 months, which was the agreed recommendation of the parties. CP 105-17, 119-125; RP 36-38.

In October 2009, Crayne filed a motion to withdraw his guilty pleas and motion for an evidentiary hearing. CP 94-98. The State agreed that an evidentiary hearing was appropriate given the nature of the allegations in Crayne's supporting affidavits. RP 41-42.

On October 28, 2010, at the first portion of the hearing on his motion to withdraw the pleas, Crayne testified. RP 50-101. On January 28, 2011, a deposition in lieu of testimony was taken of Crayne's psychiatrist, Dr. Frank Garner, which was filed in this cause. CP 21-92. On April 15, 2011, the State presented testimony of both John Hays, Crayne's attorney at the time of the plea, and Stan Munger, the investigator hired by Hays to conduct the defense investigation of this matter. RP 110-77. On that same date, Crayne's sister also testified for Crayne, and Crayne testified again in rebuttal. RP 103-09, 178-89. A transcript of the guilty plea hearing, the reports from the diminished capacity evaluations of the State's expert at Western State Hospital and

the defense expert Dr. Jerry Larsen, and the narrative police reports of the incident were admitted as exhibits. Ex. 1-4.

The trial court denied the motion to withdraw the guilty pleas, finding that (1) there was evidence to argue a defense of diminished capacity to a jury but that it was unlikely to succeed, (2) the statement on plea of guilty acknowledged the intent issue but waived it, (3) Crayne failed to show that the outcome would have been different had Hays consulted with Dr. Garner, (4) the decision to not consult Dr. Garner did not fall below the standard of care and did not breech any obligation, (5) there were many discussions between Crayne and Hays regarding the case and the offer, and (5) Crayne's demeanor at the plea hearing and his colloquy with the court did not indicate a lack of understanding of the consequences of the plea. CP 1; RP 216-22. Crayne filed a timely notice of appeal of the denial of the motion to withdraw his guilty pleas. CP 2. Crayne also filed a personal restraint petition that this court later consolidated with the direct appeal. Both the opening brief and the petition argue that Crayne received ineffective assistance of counsel regarding his decision to enter the guilty pleas.

III. ARGUMENT

THE TRIAL COURT PROPERLY DENIED CRAYNE'S MOTION TO WITHDRAW HIS GUILTY PLEAS.

While generally a trial judge's decision on whether to allow a defendant to withdraw a guilty plea is reviewed for abuse of discretion, because claims of ineffective assistance of counsel present mixed questions of law and fact, such claims are reviewed de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001) (citing *State v. S.M.*, 100 Wn.App. 401, 409, 996 P.2d 1111 (2000)).

Under the criminal rules, "[t]he court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). "Manifest injustice includes instances where ... 'the plea was not voluntary' [or] 'effective counsel was denied.' " *State v. Bao Sheng Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006) (quoting *State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001)). As the basis for his motion to withdraw the guilty pleas, Crayne claims he received ineffective assistance of counsel from Hays.

In order to establish a claim of ineffective assistance of counsel, Crayne first must show that counsel's performance was deficient. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Crayne then must show that the deficient performance prejudiced his defense. *Id.* at 687. Both prongs of the test need not be addressed if the defendant makes an insufficient showing on one. *Id.* at 697.

The standard for effective representation in the context of guilty pleas is that of reasonably effective assistance, considering the particular client and the surrounding circumstances of the case. *State v. Cameron,* 30 Wn.App. 229, 633 P.2d 901 (1981); *State v. Osborne*, 35 Wn.App. 751, 759, 669 P.2d 905, 911 (1983). Crayne must show that Hays failed to substantially assist him in deciding whether to plead guilty and that he would not have pleaded guilty but for Hays's failure to adequately advise him. *State v. McCollum,* 88 Wn.App. 977, 982, 947 P.2d 1235 (1997).

A. Defense counsel's performance was not deficient.

Again, Crayne bears the heavy burden of showing that (1) his counsel's performance fell below an objective standard of reasonableness

and, if so, (2) that counsel's poor work prejudiced him. In his sworn declaration, Crayne challenges the adequacy of Hays's investigation and his failure to consult with an expert witness. CP 99-103. In the defense memorandum in support of Crayne's motion, Crayne also argues that Hays did not properly consult with Crayne prior to Crayne's guilty plea. CP 3-10. Crayne did not challenge the adequacy of his plea statement or the plea hearing.

1. The defense investigation was not deficient.

While an investigation is not required, "... a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956, 965 (2010). However, a failure to investigate when coupled with other defects can amount to ineffective assistance of counsel. *In re Pers. Restraint of Brett,* 142 Wn.2d 868, 882-83, 16 P.3d 601 (2001). Likewise, inadequate preparation of trial counsel may constitute ineffective assistance, violating a defendant's Sixth Amendment right to representation. *Herring v. Estelle,* 491 F.2d 125, 129 (5th Cir.1974). *See generally Baty v. Balkcom,* 661 F.2d 391 (5th Cir.1981), *cert. denied,* 456 U.S. 1011, 102 S.Ct. 2307,

73 L.Ed.2d 1308 (1982); *Kemp v. Leggett*, 635 F.2d 453 (5th Cir.1981). The degree and extent of investigation required will vary depending upon the issues and facts of each case, but at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty. *A.N.J.*, 168 Wn.2d at 111-12, 225 P.3d 956.

Hays testified he familiarized himself with the State's evidence. RP 114-16, 118-19. He hired Stan Munger, a retired police captain, as the investigator for the case. RP 116-17, 160-61. Munger likewise familiarized himself with the State's evidence and interviewed Crayne and the two victims. RP 118-19, 158-59, 162-66. Hays and Munger discussed the interviews with the victims, including the victims' demeanors and apparent credibility. RP 158-59, 171-73, 176. Hays inspected physical evidence in the case, including the homemade firearm used during the attempted shooting. RP 126-32. Hays investigated the State's evidence to a degree that properly allowed him to evaluate the merits of a plea offer. As such, his investigation was not deficient and cannot serve as a basis to allow Crayne to withdraw his guilty pleas.

2. Hays's decision not to interview or consult with Dr. Garner was not deficient performance.

Hays testified that he did not interview Dr. Garner because Dr. Garner was not an expert in the diminished capacity defense, whereas Dr. Larsen is and has a large amount of experience in diminished capacity cases. RP 118, 139-40, 152. Dr. Garner's lack of expertise in the area of diminished capacity is reflected in the deposition taken of Dr. Garner for the purposes of Crayne's motion. CP 21-92. It is evident from the deposition, especially the cross-examination portion, that Dr. Garner does not have an adequate understanding of the legal concept of diminished capacity as it now applies in criminal cases in the State of Washington. As such, this lack of consultation was not deficient and therefore cannot serve as a basis to allow Crayne to withdraw his guilty plea in this matter.

3. Hays's consultation with Crayne prior to the plea was not deficient.

Counsel has a duty to assist a defendant in evaluating a plea offer. RPC 1.1 ("A lawyer shall provide competent representation to a client.

Competent representation requires ... thoroughness and preparation reasonably necessary for the representation"); RPC 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, *after consultation with the lawyer,* as to a plea" (emphasis added)); *Osborne,* 102 Wn.2d at 99, 684 P.2d 683 (citing *Cameron,* 30 Wn.App. at 232, 633 P.2d 901). Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial. *S.M.,* 100 Wn.App. at 413, 996 P.2d 1111.

Depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant. *A.N.J.*, 168 Wn.2d 91 at 112. 225 P.3d 956. A defendant "must be informed of all the direct consequences of his plea prior to acceptance of a guilty plea." *State v. Barton,* 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). The alleged infrequency or brevity of counsel's meetings with a defendant is not enough to demonstrate ineffective assistance of counsel. *Cameron*, 30 Wn.App. at 232, 633 P.2d 901 (citing *Brinkley v. Lefevre*, 621 F.2d 45 (2d Cir. 1980)).

As a basis for his motion to withdraw his guilty pleas, Crayne alleges that Hays did not spend an adequate amount of time going through the State's case and any defenses with him. CP 94-103. Crayne also alleges that Hays did not spend enough time with Crayne discussing the viability of a diminished capacity defense. *Id.* Crayne's sister testified that she was present for a brief meeting between Hays and Crayne just before the plea. RP 105-07. However, Hays testified to several lengthy meetings with Crayne at Hays's office, starting with a lengthy consultation prior to agreeing to represent Crayne in the case. RP 114-45. At these meetings, Hays discussed with Crayne the State's evidence against Crayne and a possible diminished capacity defense. RP 115-143. He arranged for Crayne to be examined by Dr. Larsen. RP 118-24, 145-49; Ex. 3. He spoke with Crayne about such a defense both before and after the evaluation by Dr. Larsen. RP 118-51. A significant issue to Hays was that Crayne was not entirely forthcoming during his evaluation with Dr. Larsen, causing Hays great concern should they call Dr. Larsen to testify on behalf of Crayne at trial. RP 122-23.

Hays explained to Crayne that Hays, in his years of criminal defense work experience, believed the odds of a conviction on the

attempted murder charge to be very high. RP 121-43. Although he did not give Crayne a copy of the discovery, he gave Crayne unfettered access to it at Hays's office, in part because Hays was aware Crayne was a slow reader. RP 116-17, 136, 154. Hays testified to spending 80 to 90 hours working on the case, which he says is more than he typically spends on a class A felony that does not result in trial. RP 141-42. He testified that he told Crayne that the most likely best-case scenario given the State's evidence was that Crayne would be found guilty of second-degree assault with a firearm enhancement, resulting in a sentence nearly as long as what he ultimately received. RP 133-35, 142-43. However, Hays was clear that the most likely outcome was an attempted murder conviction resulting in a very lengthy sentence of twenty or more years. *Id.* Hays testified that he does not as a habit "recommend" an offer to a defendant. RP 136-38. He does, however, discuss the offer with the defendant, including giving an opinion regarding whether the offer was a good one. *Id.* Hays testified that he believed the State's ultimate offer in Crayne's case was an "excellent" offer but that he told Crayne that Crayne did not have to accept it. *Id.* He testified he told Crayne they could still advance the

diminished capacity defense but that it was unlikely to prevail. RP 136-38, 156.

Hays testified that once Crayne indicated he wanted to accept the State's offer, Hays reviewed the statement on plea of guilty with Crayne, who indicated no confusion. RP 13, 138-39, 154-55. Additionally, Crayne acknowledged at the guilty plea hearing (and also acknowledged on the statement on plea of guilty filed at the hearing) that Hays had discussed with him the rights he was giving up by pleading guilty and the possible consequences of the guilty plea. RP 14-23; CP 119-25. Hays's consultation with Crayne prior to the guilty plea was adequate in this case and cannot serve as a basis to allow Crayne to withdraw the guilty pleas in this matter.

B. Any deficiency did not prejudice Crayne

When a challenge to a guilty plea is based on a claim of ineffective assistance of counsel, the prejudice prong is analyzed in terms of whether counsel's performance affected the outcome of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). The defendant must satisfy the court that there is a reasonable probability

that, but for counsel's deficient performance, he would not have pled guilty and would have insisted on going to trial. *Id.* Generally, this is shown by demonstrating to the court some legal or factual matter which was not discovered by counsel or conveyed to the defendant himself before entry of the plea of guilty.

1. Any deficiency in the defense investigation did not prejudice Crayne.

The Supreme Court has explained that where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. *Lockhart*, 474 U.S. at 59, 106 S.Ct. 366. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. *Id.* Crayne has failed to meet his burden of showing that Hays's recommendation would have changed had there been further investigation. Therefore, even if the defense investigation was deficient, Crayne cannot show prejudice.

2. Any deficiency in Hays's decision not to interview or consult with Dr. Garner did not prejudice Crayne.

In order to show that he was prejudiced by counsel's allegedly deficient performance, Crayne must, as a threshold matter, make some showing that he did in fact have such viable defenses. As the police reports admitted in this matter and Hays's testimony reflect, this was not a viable defense in this matter. RP 135-36; Ex. 1. Again, Crayne has failed to meet his burden of showing that Hays's recommendation would have changed had Dr. Garner been consulted. Therefore, even if the decision not to consult Dr. Garner was deficient, Crayne cannot show prejudice.

3. Any deficiency in Hays's consultation with Crayne prior to the plea did not prejudice Crayne.

The record reflects Hays thoroughly reviewed the evidence with Crayne, obtained an independent diminished capacity evaluation from Dr. Larsen, and spent time and effort conferring with Crayne, with Munger who had interviewed the two victims, and with the prosecutor's office on

Crayne's behalf. This is evidence of Hays's actual and substantial assistance to Crayne. Hays advised Crayne of the likelihood of conviction at trial, and based on Hays's advice, Crayne signed a statement indicating he decided to plead guilty to lesser offenses in order to obtain a much shorter sentence.

The State's evidence had been reviewed and evaluated by defense counsel as overwhelming. In the face of such strong evidence, reasonably competent and effective defense counsel could conclude Crayne's best interests would be served by taking advantage of the State's offer to reduce the charges and thus drastically reduce the recommended sentence. Crayne has not established that this deliberate tactical choice or judgment to plead guilty was the result of ignorance or inadequate pretrial investigation.

IV. CONCLUSION

Because of the many safeguards surrounding a plea of guilty, the manifest injustice standard is a demanding one. *State v. Weaver,* 46 Wn.App. 35, 41, 729 P.2d 64 (1986), *review denied,* 107 Wn.2d 1031 (1987); *State v. Hystad,* 36 Wn.App. 42, 45, 671 P.2d 793 (1983).

Considering this particular defendant and the surrounding circumstances of the case, Hays provided more than reasonably effective assistance. Crayne simply does not carry his burden in this matter; therefore, his motion to withdraw his guilty pleas was properly denied by the trial court. For the reasons argued above, Crayne's convictions should be affirmed.

Respectfully submitted this 11th day of February, 2013.

SUSAN I. BAUR
Prosecuting Attorney

By:

MICHELLE L. SHAFFER
WSBA # 29869
Chief Criminal Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, served this day, by the U.S. mail, first class postage prepaid, a true and correct copy of this Brief of Respondent addressed to:

MICHAEL DEAN CRAYNE, DOC # 325024
STAFFORD CREEK CORRECTION CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

And that I **emailed** the Brief of Respondent to the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on February 11th, 2013.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

February 11, 2013 - 3:19 PM

Transmittal Letter

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No Comments were entered.

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